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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| MARTIN J. COYNE, ET AL.,<br>Petitioners and Appellants,<br>v.<br>CITY AND COUNTY OF SAN FRANCISCO,<br>Respondents. | A145683<br><br>(San Francisco County<br>Super. Ct. No. CGC14540709) |

Martin J. Coyne, Howard Weston, and the Small Property Owners of San Francisco Institute appeal from a post-judgment order denying their motion for attorneys' fees under Code of Civil Procedure section 1021.5 after they successfully challenged a city ordinance. They contend the trial court erred in concluding that the monetary value of the case outweighed the costs of the litigation, such that an attorney fee award was inappropriate. They also contend they met all other requisites for an award. We will affirm the order.

## I. FACTS AND PROCEDURAL HISTORY

In May 2014, the City and County of San Francisco (City) enacted Ordinance No. 54-14 (Ordinance) to increase the amount of the mitigation payment landlords must make to rent-controlled tenants evicted pursuant to the Ellis Act (Govt. Code, § 7060 et seq.). Previously, landlords were required to pay $4,500 per tenant, up to a maximum of $13,500 per unit, adjusted for inflation, as mitigation for an Ellis Act eviction. (San Francisco Administrative Code, section 37.9A(e)(3)(A)–(D).) The Ordinance increased

this payment by requiring landlords to pay tenants the difference between their rent-controlled rents and the market price of a comparable apartment, calculated using a formula developed by the San Francisco Controller.

A. The Writ Petition

In July 2014, three landlords—Jacoby, Coyne, and Golden Properties LLC (Golden)—and an association of landlords, the Small Property Owners of San Francisco Institute (SPOSFI), filed a verified complaint and petition for writ of mandate challenging the Ordinance. In that pleading, Jacoby alleged that he had served notices of eviction on his tenants and faced liability of about $188,000 beyond what he would have owed if the Ordinance had not been made to apply to Ellis Act evictions before its effective date.

In September 2014, Jacoby, Coyne, Golden, and SPOSFI, along with Howard Weston, filed a first amended petition. Coyne alleged that he had served notices of eviction on his tenants and faced increased liability due to the Ordinance in the amount of $28,600 to one set of tenants and a "considerably greater" amount to another tenant (which the City construes to mean a total of at least $57,200). Golden alleged that it faced increased liability of about $480,000 as a result of the Ordinance. SPOSFI did not allege any specific monetary loss due to the Ordinance, but asserted that its members included landlords "who have invoked the Ellis Act and who plan to do so in the future" and that many of its members would be subject to the Ordinance. Appellants' attorney later averred that Weston would have to pay $185,000 more to tenants under the Ordinance.

The amended petition claimed that the Ordinance was both invalid on its face and invalid as applied to landlords who issued Ellis Act eviction notices before its effective date. Petitioners sought a writ of mandate compelling the City to set aside the Ordinance.

B. Jacoby and Golden Dismiss Their Claims

On October 8, 2014, Jacoby requested his dismissal from the lawsuit with prejudice. By that time, according to the City's calculation based on petitioners' attorney's invoice to petitioners for services (which was submitted in support of

appellants' attorney fee motion), petitioners had incurred $63,381.36 in attorneys' fees and costs.

Later in October 2014, a federal district court ruled that the Ordinance was a taking without just compensation in violation of the Fifth Amendment to the United States Constitution. (*Levin v. City & County of San Francisco* (N.D.Cal. 2014) 71 F.Supp.3d 1072 (*Levin*).)

In November 18, 2014, the remaining petitioners filed their points and authorities in support of the petition, contending the Ordinance was preempted by the Ellis Act and, under *Levin*, the Ordinance was an unreasonable exaction as a matter of law in violation of *Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886 (*Pieri*). In support of the petition, petitioners submitted declarations from their attorney, Jacoby, and Golden setting forth additional amounts petitioners would have to pay if the Ordinance was applied to Ellis Act evictions before the Ordinance's effective date.

The next day, Golden requested its dismissal from the lawsuit. By that time, according to the City's calculations, the petitioners had incurred $71,734.48 in attorneys' fees and costs.

C. Trial Court's Judgment

On March 19, 2015, the court rendered its judgment, granting the first amended petition and ordering that a writ of mandate issue to enjoin the City from enforcing the Ordinance. The court concluded that the Ordinance was preempted by the Ellis Act and was invalid as applied to landlords who issued Ellis Act eviction notices before the Ordinance's effective date. The court found that the Ordinance required relocation compensation that was not reasonable, in violation of the standard set forth in *Pieri*. It also agreed with *Levin* that the Ordinance violated the Fifth Amendment to the United States Constitution.

D. Appeal of Judgment

The City appealed the judgment (appeal number A145044). While the appeal was pending, the City enacted amendments to the Ordinance that capped the total amount of mitigation payments and made other adjustments. Coyne, Weston, SPOSFI, and a new

petitioner filed a writ petition challenging the amended ordinance. The trial court issued a writ, finding that the amended ordinance was invalid. The City also appealed from that judgment (appeal number A146569), and we consolidated the appeals.

In March 2017, we affirmed the judgments in both cases, concluding that the City's enhanced relocation payment regulations are on their face preempted. (*Coyne v. City & County of San Francisco* (2017) 9 Cal.App.5th 1215 (*Coyne*).)

E. Appellants' Motion for Attorney's Fees

Meanwhile, in April 2015, appellants filed their motion for attorney fees pursuant to Code of Civil Procedure section 1021.5 (section 1021.5). As of the date the motion was filed, petitioners had incurred $89,578.50 in attorney fees.

In their fee motion, appellants argued that they satisfied the requirements for an attorney fee award under section 1021.5 because they vindicated important public rights, the action conferred a significant benefit on the general public, and the financial burden of bringing the action outweighed the economic benefit they obtained. The City opposed the motion.

After a hearing, the court denied the fee motion, finding that the "motion fails on the final prong of [the] test" because the "estimated value of the case exceeds by a substantial margin the actual litigation costs."

This appeal followed.[1]

[1] On January 21, 2016, appellants sought augmentation of the appellate record to include the amended petition for writ of mandate, the City's opposition, and other related documents. On February 24, 2016, appellants filed a request that we take judicial notice of the Ordinance and San Francisco Ordinance No. 68-15, the judgment granting the writ, and appellants' opening brief in *Coyne*. On June 17, 2016, the City moved to augment the record to include petitioners' complaint for declaratory relief and original petition for writ of mandate, and separately moved for judicial notice of a portion of the Appellant's Appendix filed in *Coyne*. On July 7, 2016, appellants requested that we take judicial notice of the complaint in *Levin*. We grant these motions to augment and requests for judicial notice, all of which were unopposed.

## II. DISCUSSION

Section 1021.5 provides: "Upon motion, a court may award attorneys' fees to a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit . . . has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Thus, an attorney fee award may be obtained under section 1021.5 by a successful party if the lawsuit (1) vindicated an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) imposed a financial burden on plaintiffs that was out of proportion to their individual stake in the matter. (*Woodland Hills Residents Assn., Inc.* v. *City Council* (1979) 23 Cal.3d 917, 935 (*Woodland Hills*).)

Appellants contend the trial court erred in concluding that the litigation did not pose a sufficient financial burden for an award of attorneys' fees. They also contend they satisfied the two other requirements for a fee award under section 1021.5. We review the court's order for an abuse of discretion. (*Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1344 (*Lyons*); *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578.) Because the trial court is usually in the best position to evaluate the burdens and benefits of the litigation, "its determinations will not be disturbed 'unless the appellate court is convinced that it is clearly wrong.' " (*County of Orange v. Barratt American, Inc. (*2007) 150 Cal.App.4th 420, 441.)

### A. Financial Burden Disproportionate to Individual Stake

The requirement that the litigation imposed a financial burden on plaintiffs reflects the purpose of section 1021.5 to incentivize the pursuit of important cases that would otherwise not be filed. Section 1021.5 awards fees to "one whose personal stake is insufficient to otherwise encourage the action," not to litigants whose own personal financial incentives were adequate to motivate them to bring the lawsuit. (*Beach Colony II v. Cal. Coastal Com.* (1985) 166 Cal.App.3d 106, 114 (*Beach Colony II*).) The party

seeking fees therefore bears the burden of establishing that the cost of its legal victory transcends his or her personal interest, in the sense that the necessity for pursuing the lawsuit put a burden on the plaintiff out of proportion to his or her individual stake. (*Woodland Hills, supra*, 23 Cal.3d at p. 941; *Lyons, supra,* 136 Cal.App.4th at p. 1348; *Beach Colony II, supra*, 166 Cal.App.3d at p. 113.)

In comparing the cost of litigation to the plaintiffs' stake, "we do not look at the plaintiffs' *actual* recovery after trial, but instead we consider 'the *estimated value of the case at the time the vital litigation decisions were being made*.' " (*Lyons, supra,* 136 Cal.App.4th at p. 1352; see also *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9–10 (*Los Angeles Police Protective League*). (Italics added.) To determine this estimated value, the court must (1) " 'determine the monetary value of the "gains actually attained" by the successful litigants,' " and (2) "discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made." (*Lyons, supra,* 136 Cal.App.4th at p. 1352.) "Thus, for example, if the plaintiffs had only a one-third probability of ultimate victory, the estimated value of the case was only one-third the actual recovery." (*Id* at p. 1353.)[2]

Once the estimated value of the case is determined, it is compared to the plaintiffs' actual litigation costs. If the estimated value exceeds the actual litigation costs by a substantial margin, the financial burden requirement is not met. (*Lyons, supra,* 134 Cal.App.4th at p. 1353.)

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[2] It has also been said that the court should "discount[] the monetary value of the benefits that the successful litigant reasonably expected at the time the vital litigation decisions were made by the probability of success at that time" and then compare that value to the litigation costs actually incurred. (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 154–155.) Under this approach, the discount is applied to what plaintiffs *expected* to recover at the time of the litigation decisions, not to what plaintiffs actually recovered later. Appellants do not argue this approach, point to evidence of what they expected to recover, or indicate whether they got more or less than they expected. It appears the result in this case would be the same under either approach, since the parties equate what petitioners actually gained from their victory with what they had alleged (and ostensibly expected) they would be saved if the City was enjoined from enforcing the Ordinance.

1. Gains Actually Attained By Successful Litigants

As to the first step in the analysis, the parties do not substantially dispute the gains obtained by Coyne and Weston, but they do dispute the propriety of including the gains of Jacoby and Golden and the ability to ascertain any gains attained by SPOSFI. The trial court did not indicate which petitioners it included in reaching its decision.

*a. Coyne and Weston*

By prevailing on the petition to overturn the Ordinance, Coyne avoided paying at least $57,200 based on his allegations in the amended writ petition (appellants contend the amount was only $28,600). Weston avoided paying about $185,000. It was within the trial court's discretion, based on the allegations of appellants' verified amended petition, to conclude that Coyne and Weston benefitted from the litigation by approximately $242,000.

*b. Jacoby and Golden*

Based on the allegations of the petition and amended petition, the petitioners' successful challenge to the Ordinance saved Jacoby $188,000 and saved Golden $480,000, for a total of $668,000. Based on the declarations of Jacoby and Golden, however, the successful challenge to the Ordinance saved Jacoby $60,000 and saved Golden $460,000, for a total of $520,000. It is not clear which total the court accepted, so we will consider both totals in our analysis. The parties' debate actually centers on a different issue.

Appellants argue that the gains of Jacoby and Golden should not be included in the financial burden determination *at all*, because Jacoby and Golden were not "successful parties" within the meaning of section 1021.5. They urge that "successful party" means a party that achieved its litigation objectives. (See *Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1094.) Because Jacoby and Golden were dismissed from the writ proceedings months before the hearing, appellants argue that they stopped being parties to the litigation and never achieved their objectives.

There are several problems with appellants' position. First, if Jacoby and Golden are not considered successful parties within the meaning of section 1021.5, they are not

entitled to recover attorney fees. Appellants fail to establish what, if anything, should be done to reduce the attorney fee award to account for the fact that the fees were incurred on behalf of some parties who were not successful. To the contrary, appellants insist they should recover for all their attorney fees based on all work performed in the case. (The City urges that if we disregard Jacoby and Golden's financial gains from the analysis, we would be disregarding 40 percent of the petitioners and therefore should also disregard 40 percent of the attorney fees, reducing litigation costs to $53,747.)

Second, Jacoby and Golden *did* achieve their litigation objectives. Jacoby and Golden sued to obtain an injunction prohibiting the City from enforcing the Ordinance, and that is what they got. As a result, they personally saved over half a million dollars. As successful parties, their gains should be considered.[3]

Third, appellants' argument is inconsistent with the purpose of section 1021.5. The aim of the financial burden inquiry is to examine the incentives the plaintiffs had when they decided to *bring* the litigation. It is therefore irrelevant that Jacoby and Golden later dismissed their claims before judgment. Jacoby was a party to the original petition, and Golden was a party from the filing of the operative amended petition through the filing of petitioners' opening brief in support of the issuance of a writ. They were thus parties, available to share in the cost of the litigation, "from the outset of counsel's vital litigation decisions." (*Lyons, supra,* 136 Cal.App.4th at p. 1352.) In fact, they were both parties when the vast bulk of the attorney fees were incurred and the work was performed.

Fourth, appellants' approach would in the future invite litigants to game the system. Litigation could be commenced with a cadre of plaintiffs to provide a financial

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[3] City argues that other cases have approved attorney fee awards for parties who were deemed to have been successful without actually obtaining a judgment (although, as appellants point out, in those cases the parties had obtained an injunction before a dismissal, or achieved their goals by settlement or partial judgment). (*Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 668; *Choi v. Orange County Great Park Corp.* (2009) 175 Cal.App.4th 524, 530; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1291; *Hogar v. Comm. Dev. Comm. of Escondido* (2007) 157 Cal.App.4th 1358, 1365.)

arsenal and sign of strength, and then if the litigation took a sufficiently favorable turn, enough plaintiffs could drop out so that it appeared the personal stakes of the remaining plaintiffs were low enough to justify an award of attorney fees. We must take a real-world and common sense view in deciding whether the gains of petitioners who dismissed themselves from the litigation should be included in the gains obtained by the litigation.

For all of these reasons, we conclude that the gains of Jacoby and Golden should be included in the determination of the estimated value of the litigation.

*c. SPOSFI*

The parties do not dispute that the financial stake of SPOSFI is based on the financial stakes of its members. (*California Redevelopment Assn. v. Matosantos* (2013) 212 Cal.App.4th 1457, 1479; *California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570.) The amended petition did not allege a specific amount of additional payments SPOSFI's members would have to make under the Ordinance, but it did allege that SPOSFI includes members who invoked the Ellis Act and plan to do so in the future.

Appellants contend it would be too speculative to try to determine how much SPOSFI members may save in the future. Therefore, SPOSFI does not figure into the gains attained by the successful parties. (See *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 230–231 [financial burden element satisfied where monetary benefit of victory for anti-rent control plaintiff was speculative].)

The City counters that, although the record does not reveal how many members of SPOSFI have evicted tenants using the Ellis Act, the number is not unknowable and someone could figure it out. Our review, however, is limited to what is in the record.

The City also argues that the declaration of appellants' counsel in support of the fee motion described the experience of the Levins—two SPOSFI members—who owed $109,232 more to their tenant under the Ordinance than they would have owed before the Ordinance passed. Appellants reply that the Levins' benefits should not count, because

the Levins were parties not to this action, but to the earlier-decided *federal* court case. (*Levin, supra,* 71 F.Supp.3d 1072.)

We agree with appellants that the record does not establish any savings by SPOSFI members that should be included in the calculation of financial gains attained by successful litigants in this case. There is no indication the trial court concluded otherwise. We will therefore proceed to the next step of the analysis using the gains of Coyne, Weston, Jacoby and Golden.

2. Discount for Probability of Success

Appellants argue that, whether Jacoby's and Golden's gains are included or not, the estimated value of the case was heavily outweighed by the actual litigation costs because there was only a very small chance they would win a facial challenge to the Ordinance. Specifically, appellants argue that the "probability of succeeding on a facial challenge to a legislative act is slim to none." (Citing *Association of Cal. Ins. Companies* v. *Poizner* (2009) 180 Cal.App.4th 1029, 1054 [a facial challenge is " ' "the most difficult challenge to mount successfully" ' "].) They assert that recent case law shows it is difficult to win Ellis Act preemption claims. (Citing *Pieri, supra,* 137 Cal.App.4th 886; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13.) And they urge it was "highly unlikely" they would prevail on their facial challenge. At bottom, appellants propose their case was so bleak that they had just a *one in 20* chance of succeeding, so the actual gains attained in the litigation should be reduced accordingly.

Appellants' 20-to-one discount rate is unreasonable and without support. At the fee motion hearing, appellants' counsel told the court that "the discount should be at least five if not ten, a *five-to-one* standard." (Italics added.) Appellants do not explain why their chance of success became twice or four times worse than it was at the motion hearing, or how they came up with a one-in-20 chance of prevailing. Furthermore, appellants did not bring *just* a facial challenge to the Ordinance; they also brought an applied challenge on which they had a higher chance of prevailing, as they tepidly acknowledge in their appellate reply brief. And the results in other Ellis Act cases—to

the extent even relevant to the analysis—have yielded mixed results. (See *Reidy v. City and County of San Francisco* (2004) 123 Cal.App.4th 580 [mitigation provisions of Hotel Conversion Ordinance preempted]; *Pieri, supra,* 137 Cal.App.4th at p. 891 [mitigation provisions for evicted tenants not preempted].)

In the end, considering the facts and law relevant to this particular case, appellants fail to establish that the court would have abused its discretion if it concluded that petitioners' chances of prevailing were at least as good as one in five. Using that discount factor, the estimated value of the case would be the actual gains of Coyne, Weston, Jacoby and Golden, divided by five. (See *Lyons, supra,* 134 Cal.App.4th at p. 1352.)

Using appellants' calculation of the gains ($213,600 for Coyne and Weston and $520,000 for Jacoby and Golden, for a total of $733,600), the estimated value of the case would be one-fifth of that amount, or *$146,720*. Using the City's calculation of these gains (approximately $242,000 for Coyne and Weston and $668,000 for Jacoby and Golden, for a total of $910,000), the estimated value of the case would be *$182,000*. Both estimates of the value of the case—$146,720 and $182,000—are substantially higher than the actual litigation costs of roughly $90,000. Appellants therefore fail to establish error in the trial court's conclusion that "the estimated value of the case exceeds by a substantial margin the actual litigation costs."

Because the trial court did not abuse its discretion in deciding that the estimated value of the case substantially outweighed the litigation costs, and because this finding precludes appellants from recovering attorney fees under section 1021.5, we need not and do not consider the parties' additional dispute over whether the litigation vindicated an important public right within the meaning of the statute.[4]

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[4] Where the public benefits of the litigation are very significant, it may be appropriate to award attorney fees under section 1021.5 even if the estimated value of the case exceeds litigation costs by a substantial margin. (*Los Angeles Police Protective League*, *supra*, 188 Cal.App.3d at p. 10.) Although we do not decide whether the case vindicated an important public right, we do conclude that it did not create public benefits

## III. DISPOSITION

The order is affirmed.

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so significant that the court abused its discretion in denying attorney fees under the statute.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.